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IN THE
Supreme Court of the United States
October Term, 1989

Estate of JAMES MANNO and DOMINICK MANNO, doing business as ASTORIAN MANOR,

Petitioners,

vs.

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

In this New York Sales and Use Tax audit of petitioners' catering business covering an original two year period, later extended, without underlying data, to cover an additional period of 1 year, 9 months, the State auditor found 175 persons for whom, unlike all the others making reservations in the Appointment Book neither receipted contracts kept in monthly folders, nor Appointment Book notations of cancellation could be found.

In direct unilateral interviews, the auditor succeeded in establishing contact with 160 of the 175. Fifty-five of the 160 advised the auditor that their affairs had been celebrated, that they had paid the price therefore since a final price in cash or certified check, payable at least 5 days before the affair, was required by management. Of these 55, 30 still had their receipted contracts which they sent in to the auditor.

The other 105 who had booked reservations were characterized by auditor, State Tax Commission and the New York Appellate Division as "uncooperative witnesses" because they refused to say anything in furtherance of the auditor's case. However the auditor, sustained by his administrative and judicial superiors, inferred or guessed from the silences of the 105 that none of them had denied that their affairs took place.

Auditor, administrative agency and Court have affirmed an assessment of sales tax covering all 175 events and extended the assessment to cover an additional period of 1 year, 9 months with penalties and interest for a taxable base of $827,078.

The questions follow:

1. Whether it was a violation of Fourteenth Amendment procedural due process on the part of the respondents in the course of a New York sales and use tax audit of petitioners' catering business not to give copies or access to petitioners of decisively important documentary items received by respondents' auditor on unilateral solicitation of petitioners' customers, where the documents, 30 receipted contracts hitherto missing, were they to be compared to the entries—not identified by customer names (Appendix 4, p.18a), but nevertheless

recording exact amounts and dates of receipt, banking dispositions and the like—in the vendors' Cash Receipts Journal, an admittedly reliable source for all of the data going into petitioners' sales and income tax returns, could well nigh conclusively show guilt or innocence on the part of the vendors? The auditor was familiar with the comparison test between receipted contracts and entries in the Cash Receipts Journal, having announced that all contracts previously in the folders matched to Cash Receipts Journal entries and had therefore been legitimately accounted for to the tax authorities, all without reference to the later received 30 receipted contracts. Neither auditor nor Tax Commission ever mentioned a comparison test with respect to these thirty contracts, and one can legitimatly wonder why it was not until nearly three years after the close of the audit that these 30 contracts were exposed and introduced into evidence.

2. Whether it was a violation of Fourteenth Amendment substantive due process with respect to the 105 interviewed witnesses, characterized by the auditor, Tax Commission and Appellate Division as "hostile", for respondents nevertheless to assess petitioners sales tax on the 105 based, not on any evidence in what these "hostile" witnesses said but rather on the auditor's unsupported, and unlikely, conjecture of what they were trying, by their silences, to conceal; silences from which he and the reviewing authorities over him agreed that these 105 "did not deny that the affair took place."? Thus the auditor testifying at the administrative hearing of December 3, 1986 with respect to the 105, all of whom had booked reservations and therefore knew perfectly well what he was talking about:

> "What it was, it was a response indicating that they did not want to get involved. People do not like to talk to the Tax Department. It would be normal for a person to say what affair. No one said that."(Record, p. 110).

Nothing by way of speech attributed to any of the 105, nothing by way of receipted contract, nothing by way of proof of payment for an affair reinforces this ghastly silence by which petitioners were assessed nearly 70% of the State's claim.

3. Whether it was not error, reviewable by this Court, as itself violative of Fourteenth Amendment procedual due process,

a) For the New York Court of Appeals to deny to petitioners in this case their right to an appeal as of right in the light of the substantial constitutional issues directly involved in the case; and

b) For the State of New York to contrive the trial of its Civil Practice Law and Rules, §§7803 (4), 7804 (g) cases following an administrative hearing to be transferred to the Appellate Division of its Supreme Court for trial or hearing before it sitting in original, rather than appellate jurisdiction so that litigants might be deprived thereby of their ordinary due process right to one trial and one appeal by truncating their right to appeal?

PARTIES

The caption of the case in this Court contains the names of all the parties to the proceedings in the States courts.

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Estate of JAMES MANNO and DOMINICK MANNO, doing business as ASTORIAN MANOR,

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STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petioner prays that a writ of certiorari issue to review the final order herein of the Court of Appeals of the State of New York of February 20, 1990 which said order, *sua sponte,* dismissed the appeal herein taken to it as of right on the ground "that no substantial constitutional question is directly involved."

Reports of Opinions in the Case

1. Order of the Court of Appeals of the State of New York Dismissing the appeal herin on the ground that it does not directly involve a substantial constitutional question, February 20, 1990. —NY 2d—; —N.Y. Supp. 2d.—. (Appendix 1 hereto)
2. Opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, dismissing the petition herein, February 9, 1989, 147 App. Div. 2d 805; 537 N.Y. Supp. 2d 683. (Appendix 2 hereto)
3. Decision of Respondent State Tax Commission modifying adiminstrative notices of tax determination, and otherwise denying administrative petition to review assessment of additional sales tax, June 18, 1987. Not officially reported, but a copy is set forth as Appendix 3 herein.

JURISDICTION OF THIS COURT HEREIN

The final judgment of the Court of Appeals of the State of New York dismissing the appeal taken to it as of right is dated and was entered February 20, 1990. No application for rehearing was made and neither has an application for extension of time been made.

Petitioners believe that this Court has jurisdiction to entertain this petition under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Fourteenth Amendment, section 1:

"*§1. Citizenship rights not to be abridged by states*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

McKinney's Consolidated Laws of New York (Annotated) Civil Practice Law and Rules

"§5601. Appeals to the court of appeals as of right

****

"*(b) Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

"1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

"*§7803. Questions raised*

The only question that may be raised in a proceeding under this article are:

****

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

"§ *7804 Procedure*

"*(a) Special proceeding.* A proceeding under this article is a special proceeding.

"(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court, special term, in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

****

"*(g) Hearing and determination; transfer to appellate division.* Where an issue specified in subsection four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall make an order directing that the proceeding be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced; the court may, however, itself pass on objections in point of law. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, it the papers are insufficient, it may remit the proceeding."

STATEMENT OF THE CASE

The fact development of this case and the due process questions which it raises stem from unilateral interviewing by the auditor of 160 persons who had booked affair reservations in petitioners' appointment book, but for whom neither receipted contracts, routinely kept loose leaf in monthly folders, nor red ink notations of cancellation of affairs, written over the original appointmentbook entries, could be found.

From all of the receipted contracts found in the folders, the

auditor attests, matching entries, by amounts and dates since there was no identification by customer name in the cash sales journal (Appendix 4, p.18a), were invariably found in that journal:

> "*** all contracts found in the monthly folder were found to be entered in the cash receipts book"***"(Field Audit Report, Sept. 18, 1984; App. 4, p. 18a)

The cash receipts journal was, in turn, the centrally reliable source for the data reported in tax and information returns going to both income and sales tax authorities, as well as banking ransactions and the like.

a) The case for violation of procedural due process concerns 55 interviewed customers who advised the auditor that their affairs had been consummated and paid for. Of these 30 still had their receipted contracts and forwarded them (or photocopies) to the auditor's affice. Had the auditor compared receipted contracts with the cash receipts journal as he had with the receipted contracts originally in the folders, he would have known the vendors' guilt or innocence at once; innocence because a matching receipted contract and its entry into the cash receipts journal would show proper recording in the accounting record with remittance and payment to the tax authorities, or guilt because the inability to find a matching entry in the cash receipts journal implies fraud and condealment on the part of the vendors. That the auditor was keenly aware of the critical nexus between the receipted contract and its entry into the cash receipts journal is attested by his Field Audit Report of September 18, 1984 Appendix 4; p.15a:

> "Vendor maintained a book captioned Cash Receipts, in actuality, it was a Sales Book. The amounts posted in this book came from contracts that were handed to the outside Junior Accountant by James Manno. Monthly totals were then posted to a General Ledger entitled Catering Income***
>
> "A schedule was prepared for the period March 1, 1980 through November 30, 1983, showing the monthly Liquor & Beer, Food and Hat Check and Misc. Amounts. The monthly figures were then totalled quartely and com-

pared to the gross sales reported on corresponding sales tax returns. ***All differences (although minor and insignificant) were reconciled. Note that vendor is a part-quarterly (monthly) filer.

"Gross sales per books, and sales tax returns were compared to Federal Income Tax Returns ***. Differences found were attributable to several items (income from cancelled contracts, from rentals and commissions) *not subject to sales tax* that were *not* included in the gross sales reported on the corresponding sales tax returns. However, since these items have income tax implications, they were properly included on the appropriate income tax returns." (emphasis supplied)

After all, it was the presence of receipted contracts with their exact amounts and dates of collection, and their implicit demand for entry into books of account and deposit of receipts into banks rather the ever varying estimated amounts and unpredictable dates of payment—if any—of the appointment book reservation, which rendered the former indispensible for conclusively matching tests with the cash receipts journal. The receipt, therefore, of so large a sample as 30 receipted contracts hitherto missing was a golden opportunity to make comfortably just disposition in the case. Assuming that the auditor had made an immediate comparison check upon receipt of these thirty customer-supplied receipted contracts with the cash receipts journal as he had routinely done with those that had not strayed from their monthly folders:

"*** The Audit Division examined sales contracts for the period March 1, 1982 through August 31, 1982. The contracts were compared with the cash receipts journal and the appointment book. This procedure revealed that all the contracts in the file were recorded in the cash receipts journal and cancelled contracts were indicated as such in the appointment book." Appendix 3, Decision of State Tax Commission, June 18, 1987, p.10a)

it becomes embarassingly difficult to explain why, had mismatch and vendor guilt been the result of his search, he should not have proclaimed his triumphant discovery and bring his case to an irrebuttable close.

Yet not only did the auditor keep the very existence of the 30 receipted contracts to himself through the balance of time when the audit was still under way and the cash receipts journal and other books of account were still readily available at a going place of business, he did not announce their existence until 6 months after the audit was complete and 4 months after James Manno, then the sole proprietor and possibly at that time the only highly involved individual with special knowledge of the significance of the relationship between the cash receipts journal and incoming payments with their receipted contracts, died of a heart attack (Field Audit Report, Sept. 9, 1984, Appendix 4, p. 19a).

But by far the worst offense against the plain and obvious requirements of procedural due process was the withholding by the auditor of photocopies of the 30 receipted contracts received by him early in 1984. Not until the administrative evidentiary hearing of December 3, 1986 were the 30 receipted contracts made available to representatives of the vendors (Record p. 61, Exh. J), and even here it took a good look rather than guesswork to determine that these "replies from the parties contacted" were indeed the 30 receipted contracts:

> "Mr. Palmer (for respondent)—May I have the documents in my hand as a group marked for identification, as State's Exhibit J.
>
> "HEARING OFFICER: This group of documents will be marked for identification, Exhibit J. (Group of documents marked State's Exhibit J for identification, as of this date).
>
> "Q. Mr. Safran, [State auditor] I show you what has been marked for identification as State's Exhibit J and ask you if you recognize it?
>
> "A. Yes, I do.
>
> "Q. What are those documents? Would you tell us, please?
>
> "A. This is a listing of 175 previously mentioned affairs that were not entered, that came from the appointment book, that were entered in other records.
>
> "Q. Who prepared the document?
>
> "A. I did.

***

"MR. PALMER: I would offer Department's Exhibit J into evidence.

"MR. RICHARD (for Estate of James Manno): You want to make the letters as part of that exhibit also?

"MR. PALMER: I'd like to have these marked for identification. Give them to Mr. Safran, he can tell us what they are.

"MR. RICHARD: Mark them as the same.

"HEARING OFFICER: We're also marking for identification two folders of letters which will be part of Exhibit J for identification.

"Q. I show you the two file folders containing documents which have been marked as State's Exhibit J and ask you what they are?

"A. These are replies from the parties contacted.****"

"Q. Let me interrupt you so that we can get this into evidence.

"MR. RICHARD: They are marked.

"MR. PALMER: I will have them marked into evidence.

"HEARING OFFICER: Back on the record.

(Exhibit J for identification now received in evidence as of this date.)"

(Transcript of Administrative Hearing, Dec. 3, 1986; Record, pp. 59-62)

Obviously the time when the auditor had just received the 30 contract-receipts, with the audit still under way and the books of account on the ready, was the time, if the requirements of procedural due process were to be satisfied, to furnish Manno with photocopies of these 30 receipted contracts and thus enable him to put them into whatever controlling use they could exert in the case. Respondents and their auditor had deprived the vendors of a due process opportunity to which they had been entitled.

The consequences of this breach of procedural due process are far ranging. No matter how strong the evidence in this case of the vendors' receipt of funds subject to sales tax, absent affir-

mative evidence of concealment, tax evasion, fraud or non-payment of sales taxes there should be no assessment therefor against these vendors.

b) With regard to the remaining 105 interviewees, the violation of substantive due process is clear. Here the auditor, as with the more "cooperative" 55 interviewees, chose to rely on whatever evidence he could gather from direct interviews with these persons who had booked reservations in the appointment book but for whom neither receipted contracts in the monthly folders nor red ink cancellations in the appointment book could be found. All of these people, without exception, as the unwitnessed auditor would have it, elected not to discuss the facts of their particular case but nevertheless did not deny that their particular affair took place. This strange formula, never characterized as affirmative speech coming from the mouths of any of these 105 "hostile witnesses" is monotonously repeated as a formula by the auditor in his Field Audit Report (Appendix 4, p.19a), the Decision of the Tax Commission, Appendix 3, p. 10a), and the Opinion of the Appellate Division, Appendix 2, p. 3a), all with the result of assessing sales tax on account of the 105 together with the 55 plus the 15 who could not be contacted, all plus a further projection of 1 year, 9 months raising the tax base to a total of over $800,000.

If, in the case of the 55 interviewees, the underlying fallacy was that proof of payment without a receipted contract therefor in the monthly folders was necessarily proof of tax fraud and concealment, the case of the other 105 interviewees rests on yet another underlying fallacy, this one more subtly implicit and never explicit. Because, reasoned the auditor, he found cancellations of booked affairs endorsed in red ink on the particular reservation space in the appointment book and covered over with a clear insert to allow for a new booking in that space, to him it followed that *all* entries in the appointment book not bearing the indicia of cancellation necessarily went on to become consummated affairs with payment in full at least 5 days in advance. While not a shred of evidence supports that proposition, it surely made the auditor more comfortable to ignore everything that these 105 "uncooperative witnesses" had to say in favor of his authoritarian intuition that, by their

silences, these people were not denying that a necessarily paid-for affair actually took place.

Lest this becomes a too easy solution for the revenue needs of many States, or any other jurisdictions for that matter, we feel it would be well for this Court to take this case under review.

Both the strongest statement of respondents' position and the immediacy of petitioners' attack upon it as "evidence," is at the evidentiary administrative hearing of December 3, 1986 (Record, pp. 109, 110):

> "THE WITNESS: 105 of that 120 people were contacted. Of the 105 some may not have been contacted. I am not sure of the exact number, but there was enough information in the appointment book to generate a dollar figure for a sale amount. The remaining 15 were estimated based on all of the other 160.
>
> "Q. Without a confirmation you are assuming that this event took place?
>
> "A. That's correct. As I testified earlier.
>
> "HEARING OFFICER: You answered the question.
>
> "THE WITNESS: As I testified earlier, no one that we contacted denied that the affair took place.
>
> "Q. And along with that statement, where you said that no one denied that the affair took place, with that information, you assumed that the affair did take place from a negative response you are making a positive calculation?
>
> "A. It was not a negative response.
>
> "Q. If you said no one denied that the events took place, now I don't know whether you asked them a question and there was no answer, no response, but you are taking that negative response as a positive answer for your calculations?
>
> "A. It was not a negative response. What it was, it was a response indicating that they did not want to get involved. People do not like to talk to the Tax Department. It would be normal for a person to say what affair. No one said that."

If the diaphanous state of the "evidence" related by the auditor still leaves us wondering how to cope with the strong and dogmatic utterances of the agency and its auditor,

> "The cancellation of an event was also noted in the appointment book. *** all the contracts in the file were revealed in the cash receipts journal and cancelled contracts were indicated as such in the appointment book." (Decision of the State Tax Commission, Appendix 3, p.10a)

and,

> "If the affair gets cancelled, the cancellation is duly noted, in red ink, on the appropriate grid space. An index card is then attached over the space so that the room can be rebooked." (Field Audit Report, Appendix 4, p.18a)

But the auditor has himself spoiled the rigid delusion,

> "Q. *** would you continue please, Mr. Safran?
>
> "A. So what was done, we went page by page, day by day, for the two-year period 9/1/81 through 8/31/83, and where those affairs were listed, we checked to see if the information, the sale was entered in their sales book and their cash receipt book, and we noted that if the sale was cancelled, it was actually marked *sometimes* and an index card would be placed over a cancelled sale, so that place could be rebooked. ***" (Transcript of Hearing, 12/3/86, Record, p. 64) (emphasis supplied)

And here it is worth noting that the effect of the word "sometimes", is that if a practice is "sometimes" observed, "sometimes" it is not. And a reservation running out of time may be allowed to do just that without further ceremony. Admittedly, the appointment book is a schedule of operations rather than a book of account. Tended and with entries made by banquet managers, pragmatic rather than esthetic considerations are obviously the rule. Thus, the testimony of the auditor:

> "MR. BLITZER [petitioners' accountant]: Is the appointment book part of the original books of entry?
>
> "THE WITNESS: I don't believe so.
>
> "MR. BLITZER: Did you ever ask who put entries in the appointment books?

"THE WITNESS: I did not ask directly, but I noticed the people that were banquet managers were utilizing such books." (Minutes of Administrative Hearing, Dec. 3, 1986; Record, p. 100)

and in the course of that hearing at Record, p. 84:

"Q. Did you ask anybody who made the entries in the appointment book?

"A. From what I saw in the appointment book, it appeared evident to me that there were various banquet managers that were making the entries in the appointment book and I recall on several occasions seeing banquet managers or I believe that was their title, looking through appointment books, perhaps for the future."

And finally, implicit in the procedural due process violation tainting the failure of respondents to afford petitioners timely opportunity to inspect and make use of the potential significantly defensive documentary material represented by the 30 hitherto missing receipted contracts, even ultimate proof that the 105 "non-cooperative" witnesses had indeed made final payment for the affairs they had booked, could not, without affirmative proof of actual evasion of tax payment to the tax authorities, be assessed against the petitioners.

Clearly, from the time the constitutional issues of this case could be discerned—violation of procedural due process with respect to the 30 incoming receipted contracts, and violation of substantive due process on the part of the 105 "uncooperative witnesses," and the auditor's dispensing with evidence in this aspect of the case, these constitutional issues were consistently pressed by petitioners at the very next hearing opportunity as the controlling issues of the sales tax case.

STATEMENT PURSUANT TO RULE 14(h) OF THE SUPREME COURT RULES

Our objections here, as they were in the two State courts which entertained this matter, is that the assessment of the New York State Sales Tax was violative of the due process clause of the Fourteenth Amendment of our federal Constitution, procedurally with respect to the 55 customer witnesses admitting payment for their consummated affairs, with 30 of them submitting their receipted contracts therefor to the auditor, and,

substantively with respect to the 105 interviewed people who had booked reservations on the appointment book, but who, in the words of the auditor, refused to say anything affirmative of the reality of the booked affairs coming to pass, or having made the required payment in advance for them, or having any receipted contracts for them, but nevertheless, and again in the auditor's words, "not denying" that their booked affairs had indeed been celebrated. We regard these constitutional objections, as we regarded them in the State courts, as controlling of the respondents' sales tax case, and we pressed these vigorously and timely in the Appellate Division and in the Court of Appeals.

The uncovering of what we regard as constitutionally objectionable conduct on the part of respondents came out in the administrative hearing of December 3, 1976 where both the 30 receipted contracts were first revealed to petitioners; and the State auditor testified to the methodology for concluding that the 105 "uncooperative witnesses" had, in their silences, "not denied" the actuality of their booked affair coming to pass, and thus justifying the sales tax assessment on account of these 105. The State Tax Commission agreed with both the autitor's reasoning and his assessment (Decision of the Commission, June 18, 1987; Appendix 3). Accordingly, by letter of June 18, 1987, the Tax Commissioner advised petitioners:

> "Please take notice of the Decision of the State Tax Commission enclosed herewith.
>
> "You have now exhausted your right of review at the administrative level. *** a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules; and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice. ***"

This case was indeed timely instituted in Supreme Court, Albany County, but, under the provisions of New York's CPLR §§7803(4) and 7804(g)(pp. 2,3) was transferred to the Appellate Division, Third Department. Thus the opinion of the Appellate Division herein of January 9, 1989 (Appendix 2, p. 2a):

> "Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29."

This statutory transfer to the Appellate Division is significant for many reasons, not the least of which is that, *pro hac vice,* the transferee court is transformed into a court of original rather than appellate jurisdiction, and notions of opportunities lost because first raised "on appeal" while the actuality is that the transferred case is still in a court of original jurisdiction can and do stifle rights, including constitutional ones. More, unless the highest Court of the State grants discretionary permission to appeal or retains a case in honor of its statutory obligation to accord to an appellant an appeal as of right in cases directly involving constitutional questions, a litigant suffering an adverse result from a transferee court, may very well have suffered a forfeiture of an otherwise secure right to appeal notwithstanding the constitutional implications of such a forfeiture.

In practice, as with motions for summary judgment, New York Article 78 proceedings tend to be tried on paper, and the judicial trial technique with direct and cross-examination of witnesses tends to be rare.

Still, however imitative of appellate procedure an original jurisdiction judicial review of administrative proceedings featuring an evidentiary hearing may be, a court exercising original jurisdiction ought not to be able to throw out as "untimely" any attempt in the course of that original judicial proceeding, to introduce matter which, unless it is brought up in the course of that original proceeding, is in danger of being forever lost to the litigant relying on it as "untimely." Constitutional guarantees are entitled to be enforced rather than bypassed.

Once the case was transferred to the Appellate Division, petitioners' exchange of briefs with respondents' made it clear beyond peradventure that precisely the same 14th Amendment due process objections as are here advanced constituted the whole of petitioners' attack on the administrative assessment of the sales tax, viz., 1) violation of procedural due process with respect to respondents' suppression of the quintessentially im-

portant 30 receipted contracts received directly from interviewed customers, a suppression which effectively blocked petitioners from access to a potentially conclusively effective defense, and 2) violation of substantive due process in assessing additional sales tax on the basis of 105 interviewees who furnished no evidence whatsoever to support that assessment.

Thus our main brief to the Appellate Division with its two point headings concerning imposition of the sales tax assessment:

"Point I

"WHERE PROOF OF PAYMENT SUBJECT TO SALES TAX IS UNILATERALLY ADDUCED BY THE STATE TAX COMMISSION FROM 55 OUT OF 175 PUTATIVE CUSTOMERS IN AN ACTUAL AUDIT COVERING A TWO YEAR PERIOD, AND SUCH PROOF IS AS CONSISTENT WITH PROPER REPORT AND TAX PAYMENT BY AN INNOCENT VENDOR AS IT MAY BE WITH FRAUDULENT DIVERSION, IT IS A VIOLATION OF LAWFUL PROCEDURE, ARBITRARY AND CAPRICIOUS, VIOLATIVE OF CPLR § 7803 AND OF STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF PROCEDURAL DUE PROCESS, TO PROCEED TO AN ADMINISTRATIVE EVIDENTIARY HEARING, OR EVEN TO A DETERMINATION BY RESPONDENT'S AUDIT BUREAU, WITHOUT HAVING GIVEN THE VENDOR PRIOR OPPORTUNITY TO AT LEAST CONFRONT AND ACT UPON THE DOCUMENTARY EVIDENCE SO ADDUCED OR AVAILABLE, *e.g.*, PHOTOCOPIES OF THE 30 RECEIPTED CONTRACTS RECEIVED BY THE TAX AUDITOR AND PHOTOCOPIES OF BOTH SIDES OF CANCELLED CHECKS USED IN PAYMENT BY ANY OF THE 55 CUSTOMERS."

"POINT II

"SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DETERMINATION OF RESPONDENT, AFTER EVIDENTIARY HEARING, THAT PETITIONER

OUGHT TO BE ASSESSED SALES TAX, INTEREST AND PENALTIES WITH RESPECT TO THE 105 "UNCOOPERATIVE WITNESSES" WHO, BY THE AUDITOR'S ACCOUNT, UNANIMOUSLY REFUSED TO CLAIM PAYMENT FOR ANY AFFAIR, FURNISH ANY PROOF OF PAYMENT, NOR AFFIRMATIVELY CLAIM THAT THE AFFAIR WHICH THEY HAD BOOKED HAD ACTUALLY TAKEN PLACE, PLUS THE 15 WHO DID NOT EVEN RESPOND TO THE AUDITOR'S COMMUNICATION AND THE ADDED PROJECTION MADE THEREFROM."

With regard to Point II, our main brief unequivocally stated the coincidence of statutory (CPLR, §7804(g); p.3) and constitutional due process in this case:

> "***when the auditor contacted people*** whose answers were contrary to what he would have liked to have heard, it does not follow that, by branding witnesses as 'uncooperative' because while indicating familiarity with the affairs they booked, they still refused to say affirmatively that their contracted affairs were actually celebrated and that they paid the price which is the *sine qua non* for any affair, the respondent could then soak the vendor the same as though the imaginary affair were real and then, by projection, virtually double the confiscation. We believe this forfeiture not only goes beyond the bounds of *Chartair, Inc. v. State Tax Commission, 65 AD2d 44 (3rd Dept. 1978), but violates the substantive due process of both State and federal constitutions." (Ptnr. Main Brief, p.8). (Emphasis supplied)*

Notwithstanding their contentions that one must be as quick as lightning to save a constitutional point, and must also somehow object to the admission of documentary exhibits with which one is agreeable and to which one has no objection at all, the Brief of respondents to the Appellate Division had the good grace to admit that the thrust of our case was constitutional. Thus:

> "Petitioners contend that the State Tax Commission

determination is not supported by substantial evidence, that they had a right to have their total sales and use tax liability established based upon their actual records, instead of an unconsented to projection and that their right to due process of law was violated at the hearing. These contentions as hereafter shown are without merit.

"Initially, we note that petitioners' claim of denial of due process of law with respect to the admission of customers' letters and receipted contracts (responding to the auditors' inquiries) was not raised in the pleadings in this proceeding or at the administrative hearing (Petr Br, pp 29-32). Accordingly, it is not properly before this Court for review. *Matter of Haz-O-Waste Corp. v. Williams,* 103 AD2d 1001 (4th Dept 1984). Moreover, petitioners' representative at the hearing agreed to the admission of the customers' letters and receipted contracts (Exh J; original exhibit handed up with this brief [R62]), which they now claim violated their right to due process of law because of prior non-disclosure (Petr Br, p 32). Clearly, petitioners have waived their rights by failing to raise the issue at the time of the hearing when it could have sought an opportunity to rebut the evidence. Under such circumstances, there is no due process violation. *Cf. Matter of Geddes v. Wilmot,* 111 AD2d 474 (3rd Dept 1985), *lv denied* 66 NY2d 603 (1985), *app dsmd* 66 NY 2d 914 (1985); *Matter of Johnson v. Jones,* 119 AD2d 906 (3rd Dept 1986)." (Resp. Brief to Appellate Division pp. 8,9)

To which petitioners, in their Reply Brief to the Appellate Division, said, at p.2:

"***we feel that the respondent's brief has made considerable prejudicial distortion of the fact situation to which this CPLR Article 78 proceeding is addressed and raised arguments urging a preclusive bar to merit consideration of our constitutional due process and statutory procedural objections to the Commission's handling of highly material documentary evidence furnished by customers in response to requests for the same by government representatives.

"To the foregoing, this brief will make reply. And,

with respect to the Commission's preclusive effort, we will endeavor to show

> "1) That, in this judicial forum where this Court sits in an exercise of original rather than appellate jurisdiction, the constitutional and statutorily procedural objections were open to the petitioner to make under the general issue. And, if such is not the case, we respectfully move this Court, here and now to amend our petition to allege facts out of which said constitutional and statutory procedural objections arise***." Petnr. Brief, p.2

Blissfully unaware that, at the trial level, pleadings could not be amended to conform to proof, we also could not discern why, to save our due process point, we were obliged to object to the admission of documents which we felt we were entitled to inspect and copy three years before. Thus:

> "It would make no sense for the petitioner to object to the admission of Exhibit J (b) which contained the precious customer-submitted receipted contracts upon which were to rest our due process claim of Manno's right in the course of the audit to have been given access to them to enable him to prepare one of his most vital defenses, and to say that failure to object was a waiver of that due process point is, of course, utter nonsense."(Petnr. Reply Brief to Appellate Division, p.11)

Yet the Appellate Division, sitting in original jurisdiction of the case, took up respondents' theory lock, stock and barrel; Appendix 2, Appellate Division Opinion, p.3a, 4a.

> "Initially, we reject petitioners' argument that they have a right to have their tax liabililty established by their actual records and that their right to due process of law was violated by the auditor's resort to outside sources. A claim of denial of due process which was not raised in the pleadings or at the administrative hearing, as here, cannot be raised for the first time in this court (*see, e.g., Matter of Koren-Di Resta Constr. Co. v State Tax Commn.,* 138 AD2d 909, 911, *lv denied* 72 NY2d 805; *Matter of Haz-O-Waste Corp. v. Williams,* 103 AD2d 1001). Furthermore, petitioners failed to object to the admission of the

documents in issue. Accordingly, this claim has not been preserved for our review.

"We also reject petitioners' claim that the determination is unsupported by substantial evidence. When, as here, the taxpayer's records are insufficient, respondent must select a method reasonably accurate to assess the taxes due (Tax Law § 1138 [a] [1]; *see, e.g., Matter of Meskouris Bros. v. Chu,* 139 AD2d 813, 814, 815). The taxpayer must then establish by clear and convincing evidence that the audit method or tax assessment is erroneous (*see, e.g., Matter of Bonanno v. State Tax Commn., AD2d [Dec. 1, 1988]). Respondent's determination must be confirmed if there are any facts or reasonable inferences from the facts supporting the determination (see, e.g., Matter of Finserv Computer Corp. v. Tully,* 94 AD2d 197, 200, *affd* 61 NY2d 947)."

1. Manifestly the foregoing represents a refusal by the Appellate Division to deal with our constitutional objections on their own terms, which plainly charged procedural violation of due process in respondents' suppression of highly material documentary evidence produced by 30 of the 55 interviewed customers affirmatively acknowledging the celebration and payment for their affairs, and violation of substantive constitutional and statutory due process in resting the case of the 105 "uncooperative witnesses", not on evidence supplied by them but rather on the auditor's fanciful conjectures of what they should have said.

2. And it is plain distortion to attribute our constitutional objections to a sequential phenomenon like "the auditor's resort to outside sources", while ignoring the direct respondents' conduct complained of.

3. Nor can the Appellate Division, sitting in original jurisdiction, legitimately say, "A claim of denial of due process *which was not raised in the pleadings *** cannot* be raised *for the first time in this court"* (emphasis supplied). Here an appellate court has manifestly slipped into the error of forgetting that it is trying a case rather than hearing an appeal from it.

4. Nor can the opinion's attempt to require petitioners, in the interest of saving their due process objections, to have objected to the entry into evidence on December 3, 1986 of

documents which should have been furnished to them nearly three years before in the early months of 1984 be justified on any rational basis.

5. And, finally, nothing can explain away the fact that the auditor having elected to elicit supportive evidence for the Commission's case by direct interview of persons who had booked reservations in the appointment book, but for whom no receipted contract could be found, could not, in the case of 105 of the interviewees, obtain any affirmative information of any taxable payments by any of the 105 to petitioners where payments alone were the taxable events.

Proceeding thereafter on a course which would maximize appeal opportunities, petitioners first moved the Court of Appeals of the State of New York for permission, wholly discretionary with that Court, to appeal to it. That Court denied permission and petitioners then made a timely appeal as of right to the Court of Appeals of the State of New York, contending that the case directly involved construction of the Constitution of the United States.

In our invited Comments to the New York Court of Appeals, seeking to have that Court retain jurisdiction of our case as appeal taken as of right because it directly involved constitutional issues, we wrote at p.1:

> "Both our briefs to the Appellate Division and even the Tax Commission's make no bones that our effort in the Appellate Division was directed to having the imposition of a sales tax assessment invalidated on constitutional grounds of violation of these vendors' 14th Amendment due process rights, both procedural and substantive, leaving the use tax remnants of the case unsupportable because tainted by consesequences flowing from the constitutional violations."

and at p. 6 of our Comments;

"If it stands, the result below will be a triumph for preclusive treatment which could contribute to making a mockery of our precious constitutional rights,***"

And the counter Comments of the respondents, whose inane insistence on the necessity for our having objected—as the only way of preserving our constitutional objections—to the ad-

mission into evidence at the administrative hearing of documents, viz., the 30 receipted contracts, to whose admission we had no quarrel and were, in fact, extremely helpful to our cause, is justified only by the success of that cynical tactic in the State courts, and at least leaves no doubt that the questions posed by the case were constitutional 14th Amendment due process questions:

"Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals
Court of Appeals Hall
Albany, New York 12207

Re: *Manno v. State of New York, State Tax Commission*

Dear Mr. Sheraw:

"This is in response to your letter of December 27, 1989 requesting comments concerning whether a substantial constitutional question is directly involved in this appeal. It is respondent's position that this appeal does not raise any constitutional question, and, accordingly, should be dismissed.

"The Appellate Division did not consider the merits of petitioners' claim that their right to due process of law had been violated by the admission of certain documents at the administrative hearing. It observed that petitioners' claim was not raised in the pleadings or at the hearing. Moreover, petitioners did not object to the admission of the documents at the hearing. Under the circumstances, the Appellate Division concluded that the claim had not been preserved for appellate review (slip opn, p 2).

"Clearly, that claim may not now be raised in this Court. This Court has held that a constitutional question with respect to the admissibility of evidence is not preserved for review where, as here, the petitioner has failed to object at the administrative hearing. *Matter of Leogrande v. State Liquor Authority,* 19 NY2d 419 (1967); compare, also, *Matter of Herman v. Blum,* 54 NY2d 677 (1981) and *Matter of Hopkins v. Blum,* 58 NY2d 1011 (1983). Since petitioner failed to preserve the issue, it is, we submit, beyond the Court's scope of review. *Matter of Mead v.*

Levitt, 74 NY2d 634 (1989)."

Very truly yours,

ROBERT ABRAMS
Attorney General

The February 20, 1990 Order of dismissal of the appeal by the New York Court of Appeals (Appendix 1, p. 1a), reading:

> "The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is
>
> "ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.",

cannot, of course, be deemed ultimately dispositive *per se* simply because it is the mandate of the highest Court of the State. In resolving questions of practice or substance of federal constitutional law, it is this Court and not any State tribunal which, in the event of conflict, has the last word.

ARGUMENT

This petition makes no claim to proposing any changes, additions to, or departures from what is fundamental in the concepts of Fourteenth Amendment due process of law. We feel that suppression by the State of non-privileged, material, documentary evidence having a manifest potential for merit bearing on the outcome of its case against private, defending litigants is here, with respect to the 55 customers furnishing the 30 receipted contracts, at least in *prima facie* violation of procedural due process, and should have mandated an appeal as of right.

And, with respect to the 105 "non-cooperating" witnesses, the statutory due process formula of CPLR §7803(4) requiring the administrative case to be "on the entire record, supported by substantial evidence," accords very well with federal authority on "substantial" as an implied quantum where supporting evidence is required. Thus *National Labor Relations Board v. Columbian Enameling & Stamping Co., Inc.,* 306 U.S. 292 (1939) where Stone, J. said at 299, 300:

"Section 10c of the [National Labor Relations] Act Provides '*** The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. [citing cases]. Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' [citing cases], and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn from it is one of fact for the jury. [citing cases]."

And here again, New York State law is in accord; thus *54 Cafe & Restaurant v. O'Connell,* 274 App. Div. 428; 84 N.Y. Supp. 2d 729 (1st Dept. 1948) affd. 298 N.Y. 883; 84 N.E. 2d 802 (1949) where Shientag, J. said:

"While courts are loathe to interfere with determinations of administrative agencies made in good faith, they have by no means abdicated their judicial responsibility to review and pass upon administrative action claimed to be arbitrary and without foundation in fact or in law. A finding of an administrative agency 'is supported by the evience only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably.' *Matter of Stork Restaurant v. Boland,* 282 N.Y. 256, 273. *Insufficient evidence, it has frequently been held is, in the eyes of the law, no evidence. Matter of Case,* 214 N.Y. 199, 204." (emphasis supplied)

If neither far ranging novelty nor establishing new vistas in the fitting of Fourteenth Amendment due process protections to State action is the objective of this petition, we do think it is important for this Court, from time to time, to proclaim and enforce the vitality of due process. And we do think that unless this Court devotes some of its precious time to that purpose, the States and their agencies will tend to cut corners and avoid lines of investigation which may possibly vindicate the taxpayer.

Thus at the administrative hearing of December 3, 1986, Record, pp. 82, 83:

> "Q. Was Mr. Manno with you when you went through this Appointment book?
>
> "A. [Mr. Safran] No, he was not.
>
> "Q. Did you ever ask him questions about the appointment book?
>
> "A. Not about the appointment book.
>
> "Q. Why not?
>
> "A. Because I felt at that time if he knew that I had looked at the appointment book, I might never have seen it again.
>
> ***
>
> "Q. Was it always there when you were there?
>
> "A. Yes, it was.
>
> "Q. So it didn't disappear?
>
> "A. No, sir.
>
> ***"

With an audit run so freely on surmise; and projected yet further on totally unsupported theses lacking any data whatsoever, it is not surprising that the respondents came to the conclusion that they had unearthed

> "*** total unreported sales for the audit period of $827,078.00 with sales tax due thereon ***" (Decision of State Tax Commission, Appendix 3, p.11a),

and felt that

> "Due to the fact that gross sales were increased by $827,078 for the three and three-quarter year audit period, and [sic!] income tax audit is strongly recommended. Both form DO 1637 and form DO 1648 indicate an exchange of audit information. ***" (Field Audit Report, Sept. 18, 1984; Appendix 4, p.22a)

Interestingly enough, neither the federal nor the State income tax authorities have acted on that strong 1984 recommendation.

And finally, in wry response to respondents' assertion that we had lost our right to urge our constitutional objections by failing, at the administrative hearing of December 3, 1986, to

object to the admission of the documents (30 receipted contracts and customers' correspondence, hitherto suppressed and withheld from us, all constituting Exhibit J(b) to that hearing) we quote from a Ms. Sivteton's note, endorsed at the foot of the auditor's letter of inquiry and coming out of that Exhibit:

> "The dinner I had plan didn't take place. Please check your record. I had that date book but it never took place.
>
> Thank you,
> s/ Ms. Curline Sivteton"

Notwithstanding Ms. Sivteton's negative response, apparently to the auditor she was just another "hostile witness," and so he assessed a round $1,900. for her imaginary affair and, in projecting for an additional 21 month undocumented period which had been tacked on to the actual 24 months of appointment book entries, added another, round, $1,900. of assessment making a total of $3,800 base for sales tax assessment plus interest and penalties (Record, p. 262, 2d entry from bottom).

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

CARL N. MIONE,
Counsel for Petitioners
32 Court Street
Brooklyn, NY 11201
(718) 875-5537

Dated: May 11, 1990

APPENDIX 1—ORDER OF NEW YORK COURT OF APPEALS DISMISSING PETITIONERS' APPEAL, FEBRUARY 20, 1990

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of February A.D. 1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

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3 Mo. No. 180 SSD 10

In the Matter of the Estate of James Manno et al.,
Appellants,

v.

State of New York, State Tax Commission,
Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX 2—OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT, DISMISSING PETITION, FEBRUARY 9, 1989, 147 AD2d 805; 537 N.Y. Supp. 2d 683

Supreme Court—Appellate Division
Third Judicial Department

February 9, 1989 57419

In the Matter of the ESTATE OF JAMES MANNO et al.,
Petitioners,

v

STATE OF NEW YORK, STATE TAX COMMISSION,
Respondent.

MAHONEY, P.J.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29.

James Manno and his brother, petitioner Dominick Manno, conducted Astorian Manor as a catering business in Queens County. The business was operated as a partnership through February 28, 1981. From March 1, 1981 through November 30, 1983, James Manno acted as a sole proprietor, and he died on May 5, 1984. In 1983, the Audit Division of the Department of Taxation and Finance conducted an audit of the sales and use taxes paid by Astorian Manor for the period March 1, 1980 through November 30, 1983. It was determined that sales and use taxes of $111,427.33 (not including penalties and interest) were due, and notices of determination and demand were issued. Petitioners made timely application to respondent to set aside the assessment.

A hearing was held at which the Audit Division's primary auditor agreed to reduce the tax due on expense purchases and fixed assets. With reference to the sales tax, however, the auditor, while agreeing that total sales as stated in petitioners' books were in close agreement with Federal tax returns and State sales tax returns, nevertheless described that petitioners' books and records were wholly inadequate in that they failed to record numerous affairs. As a result of petitioners' record deficiencies, a two-year analysis was done of petitioners' appointment book to see if the affairs listed in the appointment book were listed in the sales and cash receipt book. The Audit Division found that 175 affairs were listed in the appointment book but nowhere else. To check on these unrecorded affairs, the Audit Division sent letters or made field visits or telephone calls to the customers who contracted for the affairs. Of the 175 affairs, 30 were verified by actual contracts, 25 were verified by oral or written statements and 105 were estimated by appointment book notations because the individuals involved, while not denying that the affair took place, refused to cooperate. The prices of the remaining 15 affairs were determined by averaging the sales prices of the aforementioned 160 affairs. Based on this methodology, the Audit Division projected the two-year analysis for the entire audit period and determined that sales tax was due on $827,078 in sales for the entire period.

Respondent, in keeping with the primary auditor's agreement, reduced the tax due on expense purchases and fixed assets. Respondent further concluded that the sale tax returns were erroneous because of underreported sales, upheld the test audit because of inadequate records and fixed petitioners' sales tax due at $67,449.41. Petitioners then commenced this CPLR article 78 proceeding to set aside the notices of sales and use tax assessment for the periods March 1, 1980 through February 28, 1981 and March 1, 1981 through November 30, 1983. Supreme Court transferred the proceeding to this court.

Initially, we reject petitioners' argument that they have a right to have their tax liability established by their actual records and that their right to due process of law was violated by the

auditor' resort to outside sources. A claim of denial of due process which was not raised in the pleadings or at the administrative hearing, as here, cannot be raised for the first time in this court (*see, e.g., Matter of Koren-Di Resta Constr. Co. v. State Tax Commn.*, 138 AD2d 909, 911, *lv denied* 72 NY2d 805; *Matter of Haz-O-Waste Corp. v. Williams*, 103 AD2d 1001). Furthermore, petitioners failed to object to the admission of the documents in issue. Accordingly, this claim has not been preserved for our review.

We also reject petitioners' claim that the determination is unsupported by substantial evidence. When, as here, the taxpayer's records are insufficient, respondent must select a method reasonably accurate to assess the taxes due (Tax Law §1138[a][1]; *see, e.g., Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 814-815). The taxpayer must then establish by clear and convincing evidence that the audit method or tax assessment is erroneous (*see, e.g., Matter of Bonanno v. State Tax Commn.*, __ AD2d __ [Dec. 1, 1988]). Respondent's determination must be confirmed if there are any facts or reasonable inferences from the facts supporting the determination (*see, e.g., Matter of Finserv Computer Corp. v. Tully*, 94 AD2d 197, 200, *affd* 61 NY2d 947).

In this case, respondent's audit revealed that petitioners' books and records did not include all of Astorian Manor's sales, thus preventing an assessment based on actual sales. The two-year analysis revealed that 175 sales were recorded in petitioners' appointment book but not recorded in their sales record. To support the allegation that the books and records were incomplete, 55 documents representing contracts and receipted letters were introduced. This proof went largely unrebutted at the hearing. Thus, the only evidence in the record is that petitioners' records were incomplete and inaccurate, thereby allowing an estimate of additional taxes pursuant to Tax Law §1138(a)(1) (*see, Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 949-950). In the absence of clear and convincing evidence by petitioners that the audit method or the tax was erroneous, the sales tax assessment must be upheld

(*Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 576-577). Petitioners' reliance upon *Matter of Chartair, Inc. v. State Tax Commn.* (65 AD2d 44, 46-47) is misplaced. This simply is not a case where petitioners have the right to an audit based upon their own well-kept, comprehensive records.

Finally, petitioners failed to establish that the assessment of the taxes on the expense purchases and fixed assets as conceded by the auditor was arbitrary or capricious.

Determination confirmed, and petition dismissed, with costs.

MAHONEY, P.J., KANE, CASEY, WEISS and LEVINE, JJ., concur.

APPENDIX 3—COVERING LETTER AND DECISION OF STATE TAX COMMISSION DENYING VENDORS' ADMINISTRATIVE PETITION TO STATE TAX COMMISSION, JUNE 18, 1987

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 18, 1987

Estate of James J. Manno
and Dominick Manno d/b/a Astorian Manor
25-18 Astoria Blvd.
Astoria, NY 11102

To the Executor:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc:
Taxing Bureau's Representative

Petitioner's Representative:
Ralph Blitzer
Gerstman, Blitzer & Gelfand, P.C.
111 Great Neck Rd.
Great Neck, NY 11021

APPENDIX 3 (cont.)—DECISION OF STATE TAX COMMISSION DENYING VENDORS' ADMINISTRATIVE PETITION TO STATE TAX COMMISSION, JUNE 18, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
ESTATE OF JAMES MANNO
AND DOMINICK MANNO D/B/A ASTORIAN MANOR
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1980 through November 30, 1983.

DECISION

Petitioners, Estate of James Manno and Dominick Manno d/b/a Astorian Manor, 25-18 Astoria Boulevard, Astoria, New York 11102, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through November 30, 1983 (File No. 55000).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 3, 1986 at 9:15 A.M. Petitioner appeared by Gerstman, Blitzer & Gelfand, P.C. (Ralph Blitzer, CPA). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioners, Estate of James Manno and Dominick Manno d/b/a Astorian Manor, operated a catering business that prepared food and drink and furnished service personnel. The premises had ten banquet rooms which were used simultaneously for different affairs. The business was operated as a partnership through February 28, 1981. Thereafter, James Manno conducted business as a sole proprietor.

2. On June 11, 1984, as the result of an audit, the Audit Division issued two separate notices of determination and demands for payment of sales and use taxes due covering the period March 1, 1980 through November 30, 1983. The first notice was issued against the Estate of James Manno (deceased), Dominick Manno, et al, d/b/a Astorian Manor for the period of the partnership (March 1, 1980 through February 28, 1981) for taxes due of $27,790.29, plus penalty and interest of $20,909.98, for a total of $48,700.27. The second notice covered the period the business was operated by James Manno as a sole proprietorship (March 1, 1981 through November 30, 1983) and was issued against the Estate of James Manno (deceased) d/b/a Astorian Manor in amount of $83,637.04 for taxes due, plus penalty and interest of $38,115.97, for a total of $121,753.01.

3. James Manno executed four consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1981 to June 20, 1984.

4. On audit, the Audit Division prepared a schedule of gross receipts by month from the cash receipts journal for the audit period. The gross sales were totalled for quarterly periods and found to be in agreement with the sales tax returns filed. Reported nontaxable sales for the period ending May 31, 1982 were verified by exemption certificates. The gross sales from the books and records were also in agreement with Federal income tax returns filed for the period of the partnership.

5. Petitioners maintained an appointment book wherein the banquet managers recorded pertinent information regarding a scheduled affair. This information included the following:

a) data and time of the affair
b) name, address and telephone number of the customer
c) number of guests
d) price per person
e) notations on meals, cocktail hour and equipment

The cancellation of an event was also noted in the appointment book. The Audit Division examined sales contracts for the period March 1, 1982 through August 31, 1982. The contracts were compared with the cash receipts journal and the appointment book. This procedure revealed that all the contracts in the file were recorded in the cash receipts journal and cancelled contracts were indicated as such in the appointment book. However, after cross checking the contracts with the appointment book, the auditor found that there were 57 affairs scheduled in the appointment book for which no contracts were in the file and the receipts from each such affair were not recorded in the cash receipts journal. Because of this discrepancy, the same procedures were followed for the period September 1, 1981 through August 31, 1983. This test disclosed that 175 affairs were scheduled in the appointment book and the receipts therefrom were not recorded in the books and records. The Audit Division contacted each of the customers by letter, telephone or personal visit using the information in the appointment books to verify that the affair took place. Thirty affairs were verified by an actual contract furnished by the customer. An additional 25 affairs were verified by either a written or oral statement from the customer. There were 105 individuals contacted who chose not to give information about the affair but did not deny that the affair took place. The Audit Division received no reply about the remaining 15 affairs and the information in the appointment book was incomplete. The sales generated by the 175 unrecorded affairs were determined as follows: The actual sale amounts were known for the 55 affairs

verified by contract or statement; the sales for the 105 affairs with complete notations in the appointment book were estimated based on the approximate number of guestsand price per person indicated in the appointment books; the sales for the 15 affairs for which there were incomplete notations were estimated using an average sales price of the previous 150 affairs. The total sales from the foregoing unreported affairs for the period September 1, 1981 through August 31, 1983 amounted to $440,179.95. In order to estimate sales for those periods that the appointment books were not examined, the Audit Division determined a separate percentage of increase of unreported sales over reported sales for such quarterly period to account for seasonal fluctuations in the catering business. The percentages of increase were applied to the applicable periods and derived total unreported sales for the audit period of $827,078.00 with tax due thereon of $16,638.37 for the period of the partnership and $50,811.04 under the sale proprietorship.

6. The Audit Division reviewed expense purchases for the period March 1, 1982 through May 31, 1982 to determine any use tax liability. Based on its analysis of the test period, the Audit Division assessed use taxes due of $24,344.07 for the entire audit period. A detailed review of fixed asset acquisitions disclosed taxes due of $19,633.85.

7. At the inception of the audit, petitioners' representative orally agreed to the use of a text period audit method for expense purchases and indicated that an agreement form would be signed when the audit was completed. Such an agreement was never executed and consequently, at the hearing the Audit Division conceded that the tax assessed on the expense purchases be reduced to $1,909.28, the actual amount found due for the test period. Additionally, the Audit Division conceded that the tax due on fixed assets should be reduced to $16,294.99.[1]

8. Petitioners argued that it was not proper for the Audit Division to estimate sales for the periods for which the appointment books were not examined.

9. Petitioners adduced no evidence of any nature to establish that the assessments were in any way erroneous.

CONCLUSION OF LAW

A. That section 1138(a)(1) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorities, where necessary, an estimate of tax due "on the basis of external indices."

B. That the audit procedures followed by the Audit Division disclosed that petitioners' sales tax returns were patently erroneous in that gross and taxable sales were substantially underreported and clearly established the unreliabilty of petitioners' books and records. When books and records are unreliable, the use of external indices is permissible (*Matter of Korba v. State Tax Commission,* 84 AD2d 655). Because of petitioners' inadequate record-keeping, it was proper under section 1138(a)(1) of the Tax Law for the Audit Division to estimate additional taxable sales for certain periods without examining any additional books and records. (*Matter of Urban Liquors, Inc. v. State Tax Commission,* 90 AD2d 576).

C. That the Audit Division reasonably calculated petitioners' tax liability for the period March 1, 1980 through November 30, 1983 and petitioners have failed to show that the audit method or tax assessed was erroneous (*Matter of Urban Liquors, Inc. v. State Tax Commission, supra*).

D. That the petitions of the Estate of James Manno and Dominick Manno d/b/a Astorian Manor are granted to the extent of the adjustments conceded by the Audit Division in Finding of Fact "7"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued June 11, 1984; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
JUN 18 1987

STATE TAX COMMISSION

s/ Roderick W. Chu
PRESIDENT

s/ Francis R. Koenig
COMMISSIONER

s/ Melvin Jackson
COMMISSIONER

APPENDIX 4—FIELD AUDIT REPORT, SEPTEMBER 18, 1984

STATE OF NEW YORK—DEPARTMENT OF TAXATION AND FINANCE
FIELD AUDIT REPORT - SALES TAX - ATTACHMENT SHEET

Field Audit Report 9/18/84 R. SAFRAN
119 QUEENS District Office Page 1 of 12 pages
ASTORIAN MANOR, Vendor
25-18 Astoria Blvd., Astoria, NY 11102
Identification Number 11-1791101 119-339-86

Include on this report detailed information on *Nature and Description of Business, Records Available, Audit Performed, Recommendations and Conclusions,* and *Vendor's Reaction.*

Prior to the inception of the physical audit work, representative (Power of Attorney submitted) was advised of the Tax Appeals Process.

Books and records were maintained at the vendor's place of business, where the certificate of authority was found to be prominently displayed. Such books and records were initially deemed adequate, but representative would only orally agree to test period methods, stating that he would sign a test period agreement (form AU-377-12) after the audit was completed. However, during the course of the audit, it was discovered that books and records were, in fact, inadequate to the extent that there was a potential for the existence of fraud with respect to unreported income. The following five (5) page report, which accompanied the AU-349 (referral of possible fraud) sent to our Albany Fraud Unit, details the preliminary audit work performed that led to our referral:

AUDIT REPORT—ASTORIA (N) MANOR

Vendor operates a catering hall in the Astoria section of Queens, New York, and has been in business since 1956. The hall has ten rooms which can and are utilized concurrently for ten different affairs, especially on weekends.

The business was conducted as a partnership through 2/28/81: James Manno, SS# 113-10-2830, partner and Dominick Manno (brother), SS# 113-10-2829, partner. Beginning with 3/1/81 and continuing through the end of the updated audit period; James Manno has conducted the business as a sole proprietor. Note that, although the print-out of vendor's sales tax filing records is headed "Astoria Manor", the corresponding sales tax returns are headed "Astorian Manor". There are also other instances of this difference in names, but vendor apparently uses both titles interchangably.

RECORDS MAINTAINED:

Vendor maintained a book captioned Cash Receipts, but, in actuality, it was a Sales Book. The amounts posted in this book came from contracts that were handed to the outside Junior Accountant by James Manno. Monthly totals were then posted to a General Ledger Account entitled Catering Income. Columns in this account are headed:

Column 1). Total
2). Liquor and Beer
3). Food
4). Hat Check & Misc.
5). Cancelled Contracts
6). (Not Used)
7). Rental Income

2 and 3 are just estimated breakdowns of sales for insurance purposes. Both 2 & 3 are subject to sales tax.

4 Hat Check and Miscellaneous is subject to sales tax.

5 and 7 are *not* subject to sales tax.

AUDIT PERFORMED:

A schedule was prepared for the period March 1, 1980 through November 30, 1983, showing the monthly Liquor &

Beer, Food, and Hat Check and Misc. amounts. The monthly figures were then totalled quarterly and compared to the gross sales reported on corresponding sales tax returns. (There were non-taxable affairs and a test of such affairs for the QE 5/31/82 found all to be supported by proper documentation). All differences (although minor and insignificant) were reconciled. Note that vendor is a part-quarterly (monthly) filer.

Gross sales per books, and sales tax returns were compared to Federal Income Tax Returns for the final partnership period of 1/1/81 - 2/28/81, and the two succeeding periods of individual proprietorship of 3/1/81 to 12/31/81 and 1/1/82 to 12/31/82. Differences found were attributable to several items (income from cancelled contracts, from rentals and commissions) not subject to sales tax that were not included in the gross sales reported on the corresponding sales tax returns. However, since these items have income tax implications, they were properly included on the appropriate income tax returns.

Purchases per books were compared to the Federal Return for the period 3/81 - 12/81 and the difference found was attributable to adjusting entries for accounts payable accruals and for transfers from a related corporation.

Vendor maintained two checking accounts: One for payroll and one for all other transactions. Per the Junior Accountant, the amount of monies deposited in the payroll account is determined by the owner, James Manno, based on James Manno's experience in this phase of the business. The procedure for cash collection, which is common in the catering industry, is as follows:

1. A deposit is made at the time the contract is written, or shortly thereafter.

2. The balance is substantially paid in full at least five days prior to the date of the affair.

3. Any last minute adjustments (plus or minus guests, or charges for additional time for the affair) that result in monetary changes are addressed the day of the affair.

The initial deposit (1) may be made in cash, by certified check, or by personal check. However, the final payment(s) (2 and 3) must be made in cash or by certified check. Again, this procedure is common in this industry.

A schedule of cash deposits was prepared from bank statements for the original audit period of 3/1/80 to 11/30/82. Total income from all sources was found to be higher than total deposits (both accounts) by $18,468. This amount represents only .15% (.0015) of total income (all sources) and is therefore considered insignificant.

Per discussions with the C.P.A., the Junior Accountant, and the owner, it was revealed that there were no cash payouts with everything being paid by check. Although contracts were imprinted with the terms "Service Charge Included," there was no evidence of any gratuities being paid by check. I asked Mr. Manno specifically about tips and he stated that there are none. I went further by asking if his waiters are paid better salaries than those that work at other catering halls where tips are handed out. He replied by saying that his employees serve to make the affairs as pleasant as possible for the customer and guests. If the customer wants to reward the employees (waiters, maitre D's, etc.), that's the customer's business. When I mentioned the possibility of cash payouts for tips, Mr. Manno stated again that there are no cash payouts.

Since there are ten rooms available and several banquet managers employed, an appointment book is maintained for the manager's use. It is a calendar year diary that, on Fridays, Saturdays (A.M. & P.M.), and Sundays (A.M. & P.M.), has a 2X5 grid of the ten rooms. These are the busiest days of the week and these grids serve to allow affairs to be booked in all available rooms simultaneously, without duplication. The notations in the book are as follows:

1. After the initial interview with the customer, the banquet manager enters the following in the appointment book on the date of the affair in the space on the grid corresponding to the room or rooms for this customer:

A). Banquet Manager's Name
B). Date that this Information is being Entered
C). Type of Affair
D). Time of Affair
E). Person(s), Address(es), and Telephone Number(s) of Customer(s)
F). Approximate Number of Anticipated Guests

G). Approximate Price per Person (will vary as changes are made and until contract is finalized)
H). Notations Regarding Meals, Cocktail Hour, Viennese Table, Etc.

2. If the affair gets cancelled, the cancellation is duly noted, in red ink, on the appropriate grid space. An index card is then attached over the space so that the room can be re-booked.

3. If the date, or the room of the affair is changed, such change(s) is (are) duly noted on the grid space and the information. (see 1A through H) is rewritten in the appointment book in the appropriate grid space. Again, an index card is attached over the space.

Note that, since Monday through Thursday are not very popular for affairs, the grid space method is not needed. On these days, notations as in 1A through H can be found, but there is no need for index cards to be used as indicated in 2 and 3.

As previously stated, vendor maintains a book captioned Cash Receipts but in actuality, it is a sales book. When the contracts are recorded, only the amounts are entered, the names are not.

After our test of non-taxable sales was completed for the quarter ended 5/31/82 (with no disallowance found), we performed the following auditing procedures with the sales contracts (which were filed monthly), the cash receipts book, and the appointment book:

Several 2X5 grids were prepared, similar to those found in the appointment book. An "X" was placed in a box where no affair took place, a "Y" was placed in a box where an affair took place and for which we had a contract (such contract was found in the cash receipts books; note that all contracts found in the monthly folder were found to be entered in the cash receipts book), and in any grid space left over, an "O" was entered, indicating an affair for which we had no contract and therefore no evidence of the income from that affair being reported. Note that cancelled contracts found in the monthly folder were traced in the appointment book to the dates they were originally scheduled for, and the cancellation was found to be duly noted in the appropriate grid space.

This procedure was also carried out for the QE 8/31/82 and the result of both quarters found approximately 57 affairs that were not recorded. Ultimately the procedure was used to cover the period 9/1/81 through 8/31/83. In all, there were approximately 175 affairs that were not recorded.

All pertinent information (names, addresses, telephone numbers, and details of the affair) was transcribed and the individuals were contacted by letter, by telephone call, or by personal field visit. No individual who was contacted denied that the affair took place (with the exception of disinterested parties contacted in error). In fact, many were cooperative to the extent that they supplied us with either copies of their contracts or statements (oral and/or written) that detailed the affair. A comparison of these contracts or statements with the appointment book notations verified the accuracy of such notations, with plus or minus variances (with respect to dollar amounts and number of guests) generally offsetting each other from one affair to the next. Therefore, where no contract or statement was available, a sale amount was projected, based on the appointment book notations. In total, there were thirty (30) affairs verified by contract, twenty-five (25) verified by statement, and one hundred five (105) projected from appointment book notations for a total of one hundred sixty (160) affairs that were not reported. Additionally, there were fifteen (15) affairs where replies from customers were not obtained and the appointment book notations were not complete. Sales generated from these affairs were determined by using an average amount based on the other 160 unreported affairs. The one hundred seventy five (175) unreported affairs were determined to represent unreported income of $440,179.95 for the period 9/1/81 through 8/31/83, which was the period where we physically examined the appointment books. Percentages of increase were determined for the quarter's ended 2/28(9), 5/31, 8/31 and 11/30 to cover the periods where there was no physical examination of appointment books. This procedure resulted in total additional taxable sales of $827,078 for the full audit period of 3/1/80 through 11/30/83.

Due to the potential for the existence of fraud, the "Committee" in Albany requested that James Manno, D/B/A

Astoria(n) Manor, be prosecuted under article 28, section 1145(b) of the New York State Tax Law for filing false and fraudulent returns. Pursuant to Section 63(3) of the Executive Law, Commissioner Roderick G.W. Chu requested that the Office of The Attorney General take whatever action deemed necessary for prosecution. However, shortly after Commissioner Chu's request was made, James Mano died as the result of a heart attack and therefore, no criminal prosecution was possible. Per discussions with Edmund S. Goldberg, Special Assistant to the Director of the Tax Department's District Office Audit Bureau, two assessment factors were revealed: Firstly, issue separate assessment documents for the period of partnership (3/1/80 through 2/28/81) and for the period of sole proprietorship (3/1/81 through 11/30/83) and secondly, assess statutory interest and penalty charges only; Do not assess fraud penalty since the surrogate court involved with James Mano's estate would overturn such fraud penalty charges. The sales tax due on the additional taxable sales of $827,078 amounted to $16,638.37 for the period of partnership and $50,811.04 for the period of sole proprietorship.

In addition to the examination of sales, expense purchases and fixed asset acquisitions were reviewed, in a routine manner, to determine the existence of any use tax liability. The months of March, April and May 1982 were assigned by team leader, agreed to by representative, and used by auditor as a test period for the examination of expense purchases. As previously stated, representative would not sign a test period agreement (form Au-377-12) until after the audit was completed. Due to the fraudulent nature of the case, we no longer had contact with the representative and therefore, the opportunity to sign the form never arose. During the period of time that the representative was in contact with us, he did voice his objection to our handling of transactions involving "Petro Fuel" in conjunction with the "light, heat, and power" account. He believed that it would not be correct to project a disallowance percentage because the correct tax rate may have been charged on earlier invoices (during the test period, vendor was charged and paid tax at the 4% N.Y.C. rate; tax should have been charged and paid at the 8¼% combined rate). The actual "Petro" payments were

transcribed for the period 3/80 - 12/82 and the payments for the remainder of the audit period, 1/83 - 11/83, were estimated, based on the actual amounts transcribed (cash disbursements were not available for that latter period). The corresponding invoices were requested but never presented, and it was therefore assumed that vendor was charged and paid tax continuously at the 4% NYC rate. Use tax due amounted to $3,416.88 (4% NY State) for the period of partnership and $9,890.00 (4% + 4¼% state) for the period of sole proprietorship on "Petro" purchases of $85,422 and $234,782 respectively.

Disallowances were found in the remaining portion of the "Light, Heat and Power" account as well as in the "Linen and Supplies" account, in the "Repairs and maintenance" account, and in the "Protection" account. Use tax due amounted to $2,137.28 at the 8% combined rate and $1.60 at the 4% NY City rate for the period of partnership and $14,037.69 at the 8% and 8¼% combined rate and $8.64 at the 4% NY City rate for the period of sole proprietorship.

Fixed asset acquisitions were reviewed for the audit period and it was determined that there were $69,952 of purchases subject to use tax for the period of partnership and $171,939 of purchases subject to use tax for the period of sole proprietorship. Use tax due at the statutory rates of 8% and 8¼% amounted to $5,596.16 and $14,037.69 for the two periods respectively. Note that, for the period 1/83 through 11/83, there was $40,471 of fixed assets acquisitions for which invoices had not been requested and use tax was assumed to be due. Adjustments are to be made if and when invoices are presented and tax is found to be paid, where applicable, or no tax is due, if exempt.

Due to the untimely death of James Manno and the impending expiration of a waiver (AU-2.10), assessments were issued by the Queens District Office on June 11, 1984 in the following manner:

Dominick Manno, Et. Al, D/B/A Astorian Manor for the period 3/1/80 - 2/28/81 in the amount of $48,700.27 (sales and use tax $27,790.29, penalty $6,947.58, statutory interest

$13,962.40) and Notice #S840611000C against the estate of James Manno (Deceased) D/B/A Astorian Manor for the period 3/1/81 - 11/30/83 in the amount of $121,753.01 (sales and use tax $83,637.04, penalty $17,746.67, statutory interest $20,369.30).

As of August 24, 1984, neither assessment has been protested. However, during a conversation with the representative, there were definite indications that protests would be forthcoming. Note that a new Power of Attorney, covering the estate of James Manno, was going to be submitted by the original representative. However, he subsequently stated that he is no longer involved in this matter at this time. A Power of Attorney had been submitted by a legal representative after the original representative was advised of the existence of the Potential for Fraud. Per conversations with Mr. Edmund S. Goldberg, it was revealed that a new Power of Attorney from this legal representative would be necessary, due to Mr. Manno's death. Copies of pertinent workpapers have been made, and will be sent to any party that so requests them, providing that a properly completed Power of Attorney form has been submitted.

Note that a Vendee Information Report (ST-510), included in the "Albany File", indicated that Astorian Manor had made a tax free purchase of tangible personal property with the use of a Capital Improvement Certificate. This transaction was addressed during the review of fixed asset acquisitions and use tax was assessed accordingly.

Vendor was complying with New York State withholding tax requirements and had filed form WRS-2. A tax compliance checklist (AU-249.2) was presented to representative for completion but it was never returned.

Due to the fact that gross sales were increased by $827,078 for the three and three-quarter year audit period, an income tax audit is strongly recommended. Both form DO1637 and DO1648 indicate an exchange of audit information. Also, a sales tax re-audit date has been indicated on form DO1637.

In summation, note that a great amount of investigative work was applied to this case by the auditor, team leader, and several other individuals.

The case was not pursued by the Attorney General's Office because of Mr. Manno's death. Due to the amount of additional tax and the substantiation we have that there were unreported sales it is strongly recommended that the full penalty and interest not be abated.

NOTE

The back up folder for the investigation work as summarized on p. 114 are in two expandable folders which will be kept with the main office file.

Examiner	Date	Approved by	Date
s/ Ronald Safer	9/17/84	s/Robert King	9/18/84

(2)

No. 89-1781

Supreme Court, U.S.
FILED
JUL 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

Estate of JAMES MANNO and DOMINICK MANNO, doing business as Astorian Manor,

Petitioners,

against

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

DOL # 87077444

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

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Dated: June 26, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(4111)

Counter Statement of Question Presented

Whether the court below properly declined to consider petitioners' claim of denial of due process because the issue had not been raised in the pleadings or at the administrative hearing.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

Counterstatement of the Case

Astorian Manor is a catering hall located in Queens County in the State of New York that has ten rooms which can be and are utilized concurrently for different affairs, especially on weekends. It was conducted as a partnership of James Manno and his brother Dominick Manno until February 28, 1981. James Manno conducted the business as a sole proprietorship from March 1, 1981 through November 30, 1983, the end of the audit period

involved here. He died on May 5, 1984. A field audit of the business had been conducted in 1983 by the Audit Division of the State Department of Taxation and Finance for the period March 1, 1980 through November 30, 1983. That audit determined that sales and use taxes were due from petitioners in the total amount of $111,427 (not including penalties and interest).[1]

Thereafter, an administrative hearing was held at petitioners' request. The evidence revealed that although the total sales as stated in petitioners' books were in close agreement with its Federal tax returns and State sales returns, many affairs listed in its appointment books, which were used to schedule contracted affairs, were not recorded anywhere else in its books and records. After analyzing petitioners' appointment books for a two-year period, the auditors found that 175 affairs were listed in petitioners' appointment books but not anywhere else (App 9a-10a).[2]

The auditors checked on the 175 unrecorded affairs by sending letters or making field visits or making telephone calls to those customers who had contracted for the affairs. Of the 175 affairs, 30 were confirmed by actual contracts sent to the auditors, 25 were verified by oral or written statements and 105 were estimated based upon the appointment book notations because although the individuals contacted did not cooperate, they did not deny that the affairs took place.[3] In 15 cases the Audit Division

[1]The audit had three areas of concern: expense purchases, fixed assets acquisition and sales. Petitioners address in this petition that portion of the audit dealing with sales. A copy of the field audit report, dated September 18, 1984, is annexed to the petition (App 14a-23a).

[2]A copy of the decision of the State Tax Commission, dated June 18, 1987, is also appended to the petition (App 8a-13a).

[3]Malcolm Richard, Esq., petitioners' attorney at the hearing, agreed to the admission of the customers' letters and receipted contracts. They were included in Exhibit "J" which was admitted at page 17 of the hearing transcript. A copy of that page is appended hereto.

received no reply and appointment book notations were not complete. In these cases the prices of the affairs were determined by averaging the sales prices of the other 160 affairs (App 10a-11a).

Since the contents of petitioners' books and records had been shown not to be accurate, the auditors' analysis for the initial two-year period was used to project taxes for the remaining audit period without looking at the appointment books for the additional period (App 11a). In its decision of June 18, 1987, the State Tax Commission concluded that the auditors had properly determined additional sales taxes due from petitioners based upon the examination of available books and records (App 8a, 12a).

Petitioners then commenced a proceeding pursuant to article 78 of the Civil Practice Law and Rules (CPLR) in the State Supreme Court. They alleged that the decision of the State Tax Commission was contrary to law and arbitrary because it was not based upon available records and that it was unsupported by substantial evidence. Petitioners did not allege at the administrative hearing or in the petition any violations of their right to due process of law.[4]

The proceeding was then transferred to the Appellate Division, Third Department, pursuant to New York CPLR 7804(g), because the petition raised a substantial evidence question. Petitioners argued for the first time in the Appellate Division that their right to due process of law had been violated at the administrative hearing (R3a-4a). The court rejected this argument holding that "[a] claim of denial of due process which was not raised in the pleadings or at the administrative hearing, as here,

[4]A copy of the petition is appended hereto.

cannot be raised for the first time in this court * * *" (citations omitted) (App 4a). The court found that petitioners had failed to object at the administrative hearing to the admission of the documents in issue (customers' letters and receipted contracts). As a consequence, it concluded that petitioners' claim of a due process violation had not been preserved for review (App 4a). The court after considering the record of the administrative hearing confirmed the State Tax Commission's decision because it found that it was supported by substantial evidence (App 4a-5a).

Petitioners then moved for leave to appeal to the Court of Appeals on non-constitutional grounds. That motion was denied on September 12, 1989, 74 NY2d 610. Thereafter, petitioners filed a notice of appeal to the Court of Appeals on constitutional grounds pursuant to CPLR 5601(b).[5] On February 22, 1990 the Court of Appeals dismissed that appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved (App 1a). ____ NY2d ____. Petitioners now seek a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

This case raises no constitutional question.

Petitioners contend here that their right to procedural due process was violated because photocopies of receipted

[5]That provision provides in pertinent part for an appeal of right to the Court of Appeals:

> "1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; * * *".

contracts received by the auditors in 1984 were not made available to them until the hearing of December 3, 1986. Petition, p 6. They argue also that their right to substantive due process was violated with respect to the 105 affairs that were estimated based upon appointment book notations where the individuals contacted by the auditors did not cooperate. Petition, p 8. We urge that the writ be denied because the constitutional questions which petitioners attempt to raise here have never been drawn into issue.

It is well settled that this Court has jurisdiction to review a final judgment of a State court "* * * only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb,* 451 US 493, 496-497 (1981); *see, also, Board of Directors of Rotary International v. Rotary Club,* 481 US 537, 550 (1987). Where the State's highest court has failed to pass upon a federal question, it is assumed, unless the petitioners show to the contrary, that the omission was due to want of proper presentation of such issue in the State court. 451 US at 495. Here, the record shows that the State courts did not pass on the questions of federal constitutional law raised here because petitioners failed to preserve those questions for review (App 3a-4a).

Petitioners waited until they were in the State Appellate Division before they claimed for the very first time that they had been denied constitutional rights. They argued that their due process rights had been violated because they had been deprived of an opportunity to see documents relied upon by the auditors prior to the administrative hearing. Petition p 14. However, if petitioners had objected on these grounds at the administrative hearing, the hearing officer, if warranted, could have given peti-

tioners an opportunity to review the documents before continuing with the hearing. This could have resolved the situation of which petitioners now belatedly complain. As a consequence of petitioners' failure to object at the administrative hearing or to raise the issue in the petition, the issue was not preserved for review by the Appellate Division and Court of Appeals. *See, Matter of Leogrande v. State Liquor Authority,* 19 NY2d 418 (1967); see, also, *Matter of Herman v. Blum,* 54 NY2d 677 (1981) and *Matter of Hopkins v. Blum,* 58 NY2d 1011 (1983). It was beyond the State courts' scope of review. *Matter of Mead v. Levitt,* 74 NY2d 634 (1989).

Likewise, petitioners substantive due process argument was not preserved for review. That argument is rooted in petitioners' claim that there is not substantial evidence in the record to support the assessment of sales tax with respect to the 105 individuals who did not cooperate. Petition, pp 14-15. Essentially, this constitutional claim is concerned with the auditors reliance on outside sources rather than on petitioners' records (App 3a-4a). Since petitioners did not raise that issue at the hearing, the administrative agency did not have an opportunity to address it and it also was beyond the scope of review of the Appellate Division and the Court of Appeals.

II.

In any event, petitioners' constitutional claims have no merit.

Petitioners alleged in this proceeding that the decision of the State Tax Commission was contrary to law and arbitrary because it was not based upon their available records and that it was unsupported by substantial evidence. The State Appellate Division had a reasonable basis to reject these allegations because the State Tax

Commission could, under State law, estimate additional taxes here in that "the only evidence in the record is that petitioners' records were incomplete and inaccurate" (App 4a). Since petitioners failed to show that the audit method or tax was erroneous (App 5a), the Appellate Division properly upheld the State Tax Commission's determination. This was a reasonable decision which the Court of Appeals declined to review. 74 NY2d 610.

Petitioners' due process claims are nothing more than a belated attempt to reformulate their unsuccessful State law claims into constitutional claims. However the record shows that petitioners' due process claims are no more compelling than their State law claims. Both rely on the same unsupported allegations of procedural and evidentiary insufficiency.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
June 26, 1990

Respectfully submitted,

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New York
Attorney for Respondents

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Deputy Solicitor General

CLIFFORD A. ROYAEL
Principal Attorney

of Counsel

Verified Petition, October 9, 1987

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY.

In the Matter

of

The Application of the ESTATE OF JAMES MANNO and DOMINICK MANNO d/b/a Astorian Manor,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law & Rules Vacating, Setting Aside and Annulling an Assessment of Sales and Use Taxes Together with Penalties and Interest Accruing on Said Assessment

against

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondent.

THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petition of the ESTATE OF JAMES MANNO and DOMINICK MANNO d/b/a ASTORIAN MANOR respectfully shows:

1. That RODERICK CUH, FRANCIS R. KOENIG and MARK FRIEDLANDER constitute the STATE TAX COMMISSION of the STATE OF NEW YORK.

2. That at all times hereinafter mentioned, JAMES MANNO operated a catering hall located at 25-18 Astoria Boulevard, Astoria, New York, doing business as the ASTORIAN MANOR.

3. That for the period from March 1, 1980 through February 28, 1981, the ASTORIAN MANOR was operated as a partnership wherein the late JAMES MANNO and DOMINICK MANNO were partners, and for the period from March 1, 1981 through November 30, 1983 the ASTORIAN MANOR was operated by the late JAMES MANNO as the sole proprietorship.

4. The ESTATE OF JAMES MANNO is liable for the payment of any taxes assessed against the late JAMES MANNO, together with any interest and/or penalties accruing thereon and, hence, has standing to initiate this proceeding.

5. On or about the Summer of 1983 an audit of the sales and use taxes paid by the ASTORIAN MANOR for the period from March 1, 1980 through November 30, 1983 was conducted by agents of STATE OF NEW YORK, DEPARTMENT OF TAXATION AND FINANCE.

6. At the conclusion of the aforementioned audit, an Audit Field Report dated September 18, 1984 was issued wherein it was alleged that Petitioners owed additional sales and use taxes due to the NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE in the sum of TWENTY SEVEN THOUSAND SEVEN HUNDRED NINETY and 29/100 ($27,790.29) DOLLARS for the period from March 1, 1980

through February 28, 1981 the period during which the business was operated as a partnership; and in the sum of EIGHTY THREE THOUSAND SIX HUNDRED THIRTY SEVEN and 04/100 ($83,637.04) DOLLARS for the period from March 1, 1981 through November 30, 1983, the period when the business was operated as a sole proprietorship. (A copy of the Report is annexed as Exhibit "A".)

7. On June 11, 1984, Respondent issued two separate Notices of determination and demands for payment of sales and use taxes due under Notice numbers S840611001Q and S840611000Q whereby it was alleged, respectively, that for the period from March 1, 1980-February 28, 1981 Petitioners owed the sum of TWENTY SEVEN THOUSAND SEVEN HUNDRED NINETY and 29/100 ($27,790.29) DOLLARS for sales and use taxes allegedly accrued plus penalty in the sum of SIX THOUSAND NINE HUNDRED FORTY SEVEN and 58/100 ($6,947.58) DOLLARS and interest in the sum of THIRTEEN THOUSAND NINE HUNDRED SIXTY TWO and 40/00 ($13,962.40) DOLLARS, making a total amount due of FORTY EIGHT THOUSAND SEVEN HUNDRED and 27/100 ($48,700.27) DOLLARS; and that for the period from March 1, 1981 through November 30, 1983, Petitioners owed the sum of EIGHTY THREE THOUSAND SIX HUNDRED THIRTY SEVEN and 04/100 ($83,637.04) DOLLARS for sales and use taxes allegedly due plus penalty in the sum of SEVENTEEN THOUSAND SEVEN HUNDRED FORTY SIX and 67/100 ($17,746.67) DOLLARS and interest in the sum of TWENTY THOUSAND THREE HUNDRED SIXTY NINE and 30/100 ($20,369.30) DOLLARS making a total sum due of ONE HUNDRED TWENTY ONE THOUSAND SEVEN HUNDRED FIFTY THREE and 01/100 ($121,753.01) DOLLARS purportedly representing additional sales and use taxes due from the Petitioners for the period in question together with penalties and interest as assessed by Respondent. (Copies

of the Notices of Determination and Demand For Payment of Sales & Use Taxes are annexed, collectively, as Exhibit "B".)

8. Thereafter, within 90 days from the date of the aforesaid Notices, an application was duly made by Petitioners to said Respondent to set aside said sales and use tax assessment representing allegedly unreported sales during the period aforesaid by the Petitioners.

9. Thereafter, on December 3, 1986, a hearing was held in connection with said application of Petitioners to set aside said assessment at the office of the STATE TAX COMMISSION at Two World Trade Center, New York, New York, before HON. ARTHUR JOHNSON, Hearing Officer, at which hearing certain testimony was adduced before said Hearing Officer both on the part of the Petitioners and Respondent.

10. Following said application and hearing and on or about June 11, 1987, said STATE TAX COMMISSION did deny Petitioners' application to set aside said sales and use tax assessments in whole except to the extent that the Audit Division conceded certain errors and did direct that the Audit Division modify the notices of determination and demands for the payment of sales and use taxes due issued June 11, 1984. (A copy of the said Decision is annexed as Exhibit "C".)

11. Thereafter, by Notice of Assessment Review dated July 27, 1987 Respondent issued two separate assessment notices under assessment numbers S840611001Q and S840611000Q, respectively, whereby it was alleged that for the period from March 1, 1980 through February 28, 1981 Petitioners owed additional sales and use taxes in the sum of TWENTY TWO THOUSAND TWO HUNDRED THIRTY

FOUR and 53/100 ($22,234.53) DOLLARS plus adjusted penalty and/or interest in the sum of THIRTY TWO THOUSAND EIGHT and 09/100 ($32,008.09) DOLLARS, making a total sum due of FIFTY FOUR THOUSAND TWO HUNDRED FORTY TWO and 62/100 ($54,242.62) DOLLARS; and for the period from March 1, 1981 through November 30, 1983 Petitioners owed additional sales and use taxes in the sum of SIXTY THREE THOUSAND FOUR HUNDRED TWENTY and 14/100 ($63,420.14) DOLLARS plus penalty and/or interest in the sum of SIXTY EIGHT THOUSAND THREE HUNDRED EIGHTY NINE and 58/100 ($68,389.58) DOLLARS, making a total sum due of ONE HUNDRED THIRTY ONE THOUSAND EIGHT HUNDRED NINE and 72/100 ($131,809.72) DOLLARS. (Copies of said Notices of Assessment Reviews are annexed, collectively, as Exhibit "D".)

12. Petitioners maintain that the STATE TAX COMMISSION'S assessment of sales and use tax allegedly due for the period from March 1, 1980 through August 31, 1983 was erroneous and illegal and respectfully request that this Court review the determination of the STATE TAX COMMISSION in this matter.

13. The Petitioners maintain that they are entitled to have the said sales and use tax assessments vacated and set aside and that the said determination of the STATE TAX COMMISSION denying the Petitioners' application to vacate and set aside the sales and use tax assessments is erroneous, arbitrary, capricious, lacks a rational basis and is illegal for the following reasons:

(a) field agents reviewed the appointment book which was maintained by the Petitioners and reflected the dates and times (as well as other pertinent information) for various affairs which were scheduled to be conducted at the

ASTORIAN MANOR. (See Exhibit "A", hereinafter referred to as "Report", last sentence of page 4 and page 5);

(b) 2x5 grids were prepared by the agents which, presumably, represented affairs which were scheduled to be conducted at the ASTORIAN MANOR for the tax quarters ending August 31, 1982 as those affairs were reflected in the Petitioners' appointment book. (Report, page 6);

(c) the appointment book maintained by the Petitioners was again reviewed by the agents who then placed various check marks on the 2x5 grids which they had prepared, placing an "x" in any box which correlated with a date when no affair was conducted, a "/" in any box which correlated with a date when an affair had been conducted and for which a contract had previously been filed by the Petitioners, and an "o" in any box which correlated with a date upon which an affair had been conducted and for which Petitioners had allegedly failed to submit a contract. (Report, page 6);

(d) the agents conducting the audit concluded that all grids wherever they had placed the mark "o" reflected affairs which had been conducted at the ASTORIAN MANOR for which Petitioners failed to pay sales and use taxes; however, despite the fact that the Petitioners' maintained a cash receipts book (Report, page 2) referred to as ". . . in actuality . . . a sales book . . ." (Report, pages 2 and 6), checking accounts (Report, page 3) and bank statements reflecting cash deposits (Report, page 4), all of which, in addition to Petitioners' sales tax returns (Report, page 3) were available to the agents, the report contains absolutely, no indication that the agents attempted to reconcile the affairs indicated in Petitioners' appointment, book for which they lacked contracts with the

records maintained and sales and use tax returns submitted by the Petitioners prior to concluding that the mere fact that they lacked contracts for the affairs in question reflected unreported sales;

(e) as a result of the audit procedure employed as aforesaid, the agents concluded that for the quarters ended August 31, 1982, the Petitioners failed to record ". . . *approximately* 57 affairs . . ." (Report, page 6, emphasis added);

(f) the same procedure was utilized to cover the period from September 1, 1981 through August 31, 1983 and by use of these methods the agents concluded that during the course of that period—which is co-extensive with the period referred to in subdivision (e) hereof—the Petitioners failed to record ". . . *approximately* 175 affairs . . ." (Report, page 6, emphasis added);

(g) the agents duly recorded the names, addresses and telephone numbers of the persons who gave the affairs in question and endeavored to confirm that the affairs were actually conducted (Report, page 7);

(h) the agents allegedly verified that 55 of the "approximately 175" affairs which the Petitioners had allegedly failed to record were, in fact, conducted, 25 of the aforementioned affairs were verified by contract (which the parties presumably provided to the agents and 30 were verified by statements purportedly made to the agents (Report, page 7);

(i) the information received by the agents during the course of the aforesaid field investigation "verified" the accuracy of the information contained in the Petitioners' appointment book (Report, page 7);

(j) based upon the aforementioned audit and investigative procedures employed by the agents as aforesaid, they determined that ". . . the 175 unreported affairs . . ." generated ". . . unreported income of $440,179.95 for the period from September 1, 1981 through August 31, 1983 (Report, page 7)

(k) despite the fact that no representative of the Petitioners signed a test period agreement (Report, pages 1 and 9) and despite the fact that the agents conducting the investigation clearly confirmed the accuracy of the Petitioners' appointment book (Report, page 7), the agents conducting the audit failed to examine the Petitioners' appointment book for the full audit permits and estimated additional sales and use taxes allegedly due from the Petitioners based upon a percentage of increase projected over designated tax quarters and concluded that the Petitioners generated ". . . additional taxable sales of $827,079.00 . . ." for the period from March 1, 1980 through November 30, 1983—which figure includes the allegedly unrecorded income set forth in paragraph (j) hereof;

(l) based upon the procedures and practices referred to herein, the agents conducting the audit determined that additional sales tax was due from the Petitioners in the sum of $16,638.37 for the period during which the ASTORIAN MANOR operated as a partnership—March 1, 1980 through February 28, 1981—and in the sum of $50,811.04 for the period during which the business was operated as a sole proprietorship—March 1, 1981 through November 30, 1983 (Report, page 8);

(m) Section 1138(a)(i) of the Tax Law provides, in relevant part, that if a return when filed is incorrect or insufficient, *the amount of tax due shall be determined* by the

Tax Commissioner *from such information as may be available"* (emphasis supplied);

(n) although the aforementioned section of the Tax Law also provides that "if necessary, the tax may be estimated on the basis of external indicies . . ." (emphasis supplied), it is clear from the context of the section (with the declarative "shall" juxtaposed with the permissive "may") that the confirmation of authority to utilize external indicies to project estimated tax due is predicated upon the absence of available records from which to accurately calculate the amount of tax due, if any;

(o) despite the fact that the agents who conducted the audit in question acknowledged that the Petitioners' cash receipts (or "cash sales") book (Report, pages 2 and 6), checking accounts (Report, page 3), bank statements reflecting cash deposits (Report, page 4) and appointment book (Report, page 6) were fully available to them during the course of the audit, coupled with the fact that the investigation conducted by the agents confirmed the accuracy of the information contained in the Petitioners' appointment book (Report, page 7), the agents conducting the test failed to assess (determine) the amount of tax due based upon the information which was available and opted instead to utilize external indicies to estimate the tax which they believed to be due during the audit period;

(p) the Petitioners timely objected to the assessment and specifically raised the issue of the manner in which the agents estimated the tax due despite the availability of all pertinent records at the hearing which was conducted before the STATE TAX COMMISSION on December 3, 1986 (see Exhibit "C", page 1 of the decision);

(q) despite the Petitioners' objections and the imperative of the statute in question, the STATE TAX COMMISSION arbitrarily, capriciously and illegally sustained the assessments of sales tax due;

(r) the STATE TAX COMMISSION has a duty to select a method of audit reasonably calculated to reflect sales and use taxes due and the use of external indicies is impermissible where, as in the instant case, the records available are sufficient to enable the verification of sales receipts and the conduct of a complete audit;

(s) there was no basis in law or fact or in the evidence adduced before the STATE TAX COMMISSION upon which the COMMISSION may rest, and the determination of the COMMISSION is contrary to the law and arbitrary on the facts.

14. Notice of Application to review the aforesaid determination of the STATE TAX COMMISSION is given and this proceeding is instituted within four months after the mailing to Petitioners of notice of said determination.

15. The original of the applications, returns and determinations herein referred to, and the minutes of the testimony presented and the evidence at the hearing held by the COMMISSION as aforesaid are in the possession of the STATE TAX COMMISSION so that the same may be returned to this Court by such COMMISSION; and the same may be made part hereof as if at length set forth herein.

16. Petitioners have paid to the STATE TAX COMMISSION the full amount of the said assessment with interest and penalty charges thereon, as determined in the determination of said COMMISSION as being payable by the Petitioners, under protest, and will duly procure and file

with the COMMISSION just prior to making this application an undertaking, as required by the Tax Law of State of New York, for the costs and charges which may accrue against them in the prosecution of this proceeding including the costs of appeals.

17. No application for this or similar relief has been made to any other Court or Judge.

WHEREFORE, your Petitioners respectfully request that this Court review the determination of the TAX COMMISSION in the matter of the application of the Petitioners to vacate and set aside said sales and use tax assessments, #S840611001Q for the period from March 1, 1980 through February 28, 1981 and sales and use tax assessment #S840611000Q for the period from March 1, 1981 through November 30, 1983, being the determinations rendered June 18, 1987, and that the Court reverse and annul the determination of the COMMISSION in the matter, and in this connection direct that the COMMISSION shall vacate, set aside and annul said sales and use tax assessment against Petitioners for the said period and directing a refund to Petitioners of the sum of $190,438.97 said sales and use taxes determined to be payable in the said determination and which has been paid under protest by the Petitioners, and that the Petitioners have such other and further relief as may be just and proper, together with the costs of this proceeding.

Dated: Brooklyn, New York
October 9, 1987

ESTATE OF JAMES MANNO

By: Carl N. Mione—Attorney for
Estate of JAMES MANNO

Exhibit 1 of the Return, December 3, 1986.

Safran-Direct

(16) Hearing Officer: Off the record.

(Whereupon, a discussion was held off the record.)

Mr. Palmer: I would offer Exhibit J into evidence.

Mr. Richard: You want to make the letters as part of that exhibit also?

Mr. Palmer: I'd like to have these marked for identification. Give them to Mr. Safran, he can tell us what they are.

Mr. Richard: Mark them as the same.

Hearing Officer: We're also marking for identification two folders of letters which will be part of Exhibit J for identification.

Q. I show you the two file folders containing documents which have been marked as State's Exhibit J and ask you what they are? A. These are replies from the parties contacted.

Q. And of these replies, which were summarized in the other exhibit J? A. Yes, that's correct. I would like to explain how we arrived at these 175 additional affairs. The appointment book that is utilized—

Q. Let me interrupt you so that we can get this (17) into evidence.

Mr. Richard: They are marked.

Mr. Palmer: I will have them marked into evidence.

Mr. Richard: Put them in evidence.

Hearing Officer: Back on the record.

(Exhibit J for identification now received in evidence, as of this date.)

Hearing Officer: You want these back?

Q. Okay, maybe you can tell us a little bit about what the relationship between Exhibit J, the summary and Exhibit J, the letters in the files are and what you did to obtain them and how these were prepared and how they came to be received by you? A. The appointment book since Astorian Manor is a rather large caterer, they have ten rooms that are available for use for affairs, for Friday nights, Saturdays and Sundays a.m. and p.m. In the appointment book there was a two by five grid which listed, it was two columns, five rows listing each room and what affair was booked. The appointment book was used by the various banquet managers when they booked an affair.

Q. Mr. Safran, do you have anything to illustrate what that appointment book looked like?

Supreme Court, U.S.
FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1781

IN THE
Supreme Court of the United States
October Term, 1989

Estate of JAMES MANNO and DOMINICK MANNO, doing business as ASTORIAN MANOR,

Petitioners,

-against-

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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IN THE
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Estate of JAMES MANNO and DOMINICK MANNO, doing business as ASTORIAN MANOR,

Petitioners,

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STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

POINT I

IN THE APPELLATE DIVISION WHERE PROCEEDINGS WERE BEING CONDUCTED AT THE TRIAL RATHER THAN THE APPELLATE LEVEL, PETITIONERS WERE FREE TO MAKE AN EFFECTIVE MOTION TO AMEND THEIR INITIATORY JUDICIAL PLEADING TO REFLECT AND CLAIM THE BENEFIT OF THE FOURTEENTH AMENDMENT DUE PROCESS CONSTITUTIONAL CLAIMS DOMINATING THEIR CASE

In this case where, we contend, the New York State taxing authority violated the Fourteenth Amendment due

process rights of petitioners 1) by suppressing and concealing from petitioners material documentary evidence received by the State auditor in the course of a sales and use tax audit in which the documentary evidence was potentially decisive of the case and petitioners were clearly constitutionally entitled to have been given access to it, timely, in the course of the audit, and 2) where with respect to the 105 customers of petitioners out of 160 interviewed by the auditor, no evidence at all supports or justifies the tax assessment made on their account,* the respondents, in their opposition Brief herein, counter by claiming that, at the latest not only is the assertion of a claimed constitutional right or violation in the petition commencing the judicial proceeding necessary and essential for the future viability of the constitutional point, but, apparently that, in constitutional matters at least, the pleading itself is rigidly immune to change even at the trial level.

Such could possibly be the case, witness the Appellate Division holding herein (Appendix 2, p. 4a):

> "*** A claim of denial of due process which was not raised in the pleadings, or at the administrative hearing, as here, cannot be raised for the first time in this Court ***. Furthermore, petitioners failed to object to the admission of the documents in issue. Accordingly, this claim has not been preserved for our review."

---

*As stated by the Appellate Division at p. 2 of this Brief, raising a constitutional objection at an administrative hearing has equal potency with objections raised in an initiatory pleading in a judicial matter for saving the constitutional point. And it should be remembered that at the administrative hearing of December 3, 1986 the testimony of the State auditor that the 105 interviewed "hostile witnesses" did "not deny" that their affairs took place, was vigorously attacked as resting on no evidence at all by petitioner (Pet. p. 9).

These 105 represent nearly 70% of the total assessment.

And to show the deficiencies of the Article 78, CPLR petition in this respect, respondents have annexed a copy of our CPLR petition (Resp. Brief, pp. A1-A11 which reads in pertinent part as follows:

> "(d) *** despite the fact that the Petitioners maintained a cash receipts book ***, checking accounts and bank statements reflecting cash deposits *** all of which *** were available to the agents, the report contains absolutely no indication that the agents attempted to reconcile the affairs indicated in Petitioners' appointment *** book for which they lacked contracts with the records maintained and sales and use tax returns submitted by the Petitioners prior to concluding that the mere fact that they checked contracts for the affairs in question reflected unreported sales; ***."

While the foregoing perceives our case somewhat dimly and far from perfectly, as happens frequently in the beginnings of cases that come to us out of obscure backgrounds, still, contrary to both State and federal rules which freely allow amendments of pleadings to conform to the facts—and here we brought out the constitutional character of the case from its very beginnings in the Appellate Division—sitting as a trial bench—still the Appellate Division, mistakenly assuming the attributes of an appellate court although actually sitting as a specially statutorily designated Court of original jurisdiction, chose to ignore our seriously intended argument in our formal motion to amend our petition to conform to the evidence we had adduced of constitutional violations in respoents' conduct and thus qualify them for judicial remediation.

And thus we said both in our Reply Brief to the Appellate Division which was trying our case and was hearing our trial argument *before* its trial decision of the case, and as quoted in our petition for certiorari at page 17:

> " '*** in this judicial forum where this Court sits in an exercise of original rather than appellate jurisdiction, the constitutional and statutorily procedural objections were open to the petitioner to make under the general issue. And, if such is not the case, we respectfully move this Court, here and now to amend our petition to allege facts out of which said constitutional and statutory procedural objections arise. ***' "

What the Appellate Division and the respondents seem to be losing sight of is that our federal Constitution was and is an instrument intended to be enforced, and the foregoing motion was a trial motion and not an attempt on appeal to recover a point which had been neglected below.

At this time we submit, in single copy and for whatever application the Court may elect:

1. The Record on transfer to the Appellate Division

2. Petitioners' Main and Reply Briefs to the Appellate Division

3. Respondents' Opposition Brief to the Appellate Division

4. Petitioners' Jurisdictional Statement to the New York Court of Appeals

5. Petitioners' Comments to the New York Court of Appeals

6. Respondents' Comments to the New York Court of Appeals

Copies of all of the foregoing were exchanged with adversary counsel and are already in their possession.

POINT II

TACITLY, RESPONDENTS HAVE CHOSEN NOT TO CONTEST THE MERITS OF PETITIONERS' PROOFS THAT RESPONDENTS HERE VIOLATED FOURTEENTH AMENDMENT DUE PROCESS BOTH PROCEDURAL AND SUBSTANTIVE, AND ALSO DO NOT CONTEST THE FACT OF PETITIONERS' VIGOROUS ATTACK, *AT THE ADMINISTRATIVE HEARING* (Pet. p. 9), UPON THE SUFFICIENCY OF THE EVIDENCE SOUGHT TO BE ADDUCED IN SUPPORT OF THE TAX ASSESSMENT BASED ON THE 105 "UNCOOPERATIVE WITNESSES"

The silences of Respondents' Opposition Brief are eloquent. Not only does it make no comment on our assertion that there is no evidence to support the assessment of sales tax with respect to the 105 "uncooperative witnesses," it also omits to relate that the clear insufficiency was vigorously exposed and attacked at the administrative hearing. The importance of these 105 out of the 160 interviewed should not be underrated since nearly 70% of the total tax assessment is attributable to the 105.

Nowhere does respondents' Brief even touch upon, let alone contest our account of the three year suppression by the auditor and the Tax Commission of the 30 receipted contracts and their capability of being matched to cash sales journal entries—like the receipted contracts that had

been kept in folders which perfectly matched to corresponding entries in the cash sales journal.

Nowhere does it contest the fact that guilt or innocence of the vendors was instantly determinable by the matching test and that respondents did not dare to proclaim the results of such a test.

In short respondents would prefer to make no issue of any of the merits of this constitutional case.

But, for good or ill, respondents have added a fourth question presented by the case, and an important one at that, namely, whether the preclusive practice of effectively excluding federal constitutional questions and arguments from merit consideration by State courts, whether sitting in original or appellate jurisdiction, because of failure to claim or identify constitutional rights or violations in the pleadings originating the case, coupled with State court practice making such pleading immutable to change or amendment even at the trial level of the case ought not to be reviewed by this Court?

Patently, had our motion to amend the petition to reflect due process constitutional issues urged by us throughout the transferred hearing before the Appellate Division been respected and granted, the marked lack of a disposition on the part of respondents to dispute its constitutionally impermissible concealment and withholding of the customer-supplied 30 receipted contracts from James Manno and respondents' tacit admission that no evidence supported the tax assessment with regard to the 105 "hostile witnesses," would surely be telling. In fact such failure to confront the merits of petitioners' case does nothing to raise the moral stature of respondents' case.

CONCLUSION

For the foregoing reasons as well as those urged in our petition, we respectfully pray this Court to issue its writ of certiorari herein.

Dated: Brooklyn, New York
July 16, 1990

Respectfully submitted,

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